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IN THE

Supreme Court of the United States

NEIL RANDALL, ET AL.,

Petitioners,

—v.—

WILLIAM H. SORRELL, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

I. ACT 64'S EXPENDITURE LIMITS VIOLATE THE FIRST AMENDMENT

A. Buckley Properly Rejected Expenditure Limits As an Unconstitutional Restraint on Core Political Speech

Despite Respondents' best efforts to argue otherwise, Act 64's expenditure limits cannot be upheld without rejecting the core holding of *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).[1] This Court should reject that invitation for three reasons. First, *Buckley's* recognition that expenditure limits directly restrict core political speech that lies at the heart of the First Amendment was correct. Second, Respondents' principal arguments largely mirror arguments that were considered and rejected in *Buckley*. Third, respondents' effort broadly to redefine the state's asserted interest in dictating the appropriate amount of political speech directly conflicts with core First Amendment values.

Throughout their briefs, Respondents describe Act 64 as if it were only about money and not about speech. Nothing could be further from the truth. Under Act 64's broad definitions, a candidate who has reached her expenditure limit is prohibited from any manner of campaigning. She cannot spend another dollar to carry her message forward or to respond to criticisms leveled by opponents, the opposing political party, advocacy groups or the media. The restriction applies to both cash and in-kind expenditures. Thus, for example, once a candidate has reached the statutory spending limit, Act 64

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[1] Unless otherwise indicated, the term "Respondents" refers to both the State Respondents and the Intervenor Respondents.

prohibits the candidate from even driving across town to a political rally.

This direct restraint on speech contravenes not only the holding, but the reasoning, of *Buckley*. It is not up to the government to decide how much speech is necessary for candidates and voters in a political campaign. That is a decision for the candidates and voters to make in our constitutional democracy. Indeed, the prohibition on election-day editorials invalidated in *Mills v. Alabama*, 384 U.S. 214 (1966), represents a "lesser intrusion on constitutional freedom" than a limitation on the amount a candidate can spend during an entire campaign. *Buckley*, 424 U.S. at 50.

Act 64 does something this Court has "never allowed": the Act "prohibit[s] candidates from communicating relevant information to voters during an election." *Republican Party of Minn. v. White*, 536 U.S. 765, 782 (2002). By focusing on candidate speech, moreover, Act 64 has two perverse results. It deprives voters from hearing the most important voice in any political campaign — namely, the voice of the candidate. And, as a result, it magnifies the importance of so-called special interest spending, further undermining the state's asserted interest in limiting the influence of such groups on the electoral process. *Buckley*, 424 U.S. at 45.

In addition, expenditure limits inevitably blur the line between discussions of issues by candidates, particularly incumbents, and election speech. Candidates are intimately tied to public issues involving legislative proposals and government actions. *See, e.g. Buckley*, 424 U.S. at 42. Although candidates campaign on these issues, they are no less entitled to engage in the public discussion of those issues simply because they are also running for office. *Id.* at 52-53. "[T]he notion that the special context

of electioneering justifies an *abridgement* of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head." *Republican Party of Minn.*, 536 U.S. at 781. There are, as well, serious definitional issues in determining what speech by incumbents will count as an expense under Act 64. *See* P.A. 214a-218a.[2]

Respondents' failure fully to answer these fundamental criticisms of Act 64 is fatal under the exacting scrutiny required by *Buckley*, 424 U.S. at 44. The Court's cases involving speaker-based and content-based restrictions on candidate and electoral speech consistently apply the same exacting standard. *See, e.g.*, *Republican Party of Minn.*, 536 U.S. at 774-775; *Burson v. Freeman*, 504 U.S. 191, 198 (1992) (plurality opinion); *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989); *Brown v. Hartlage*, 456 U.S. 45, 53-54 (1982); *First Nat'l Bank of Boston v. Belotti*, 435 U.S. 765, 785 (1978). Act 64 cannot meet this standard because it is not supported by a compelling state interest, and it is not narrowly tailored. For Act 64's spending limits to meet this exacting standard,

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[2] Respondents' argument that spending limits will not further entrench incumbents is simply not credible. Indeed, Vermont understood this would be the case, which is why slightly reduced limits for incumbents were adopted. The inadequacy of this fix is discussed in our opening brief at 16 n.11. More fundamentally, "everyone knows this is an area in which evenhandedness is not fairness. If *all* electioneering were evenhandedly prohibited, incumbents would have an enormous advantage." *McConnell v. FEC*, 540 U.S. 93, 249 (2003) (Scalia, J., concurring in part, concurring in judgment in part, and dissenting in part); *see also Buckley*, 424 U.S. at 56-57 ("[E]qualization of permissible campaign expenditures might serve not to equalize the opportunities of all candidates, but to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign.").

Respondents "must demonstrate that it does not unnecessarily circumscribe protected expression." *Republican Party of Minn.*, 536 U.S. at 775 (citation, internal quotation marks, and alteration omitted). Act 64 fails this test because it unnecessarily restrains core political speech in a way that is barely tailored to serve the interests purportedly advanced by the Act.[3]

Buckley remains grounded in core First Amendment principles that this Court has never disavowed; indeed, they are the very principles that undergird our democracy. "[T]he concept that the Government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." 424 U.S. at 48-49. Thus, in discussing the limitation on independent expenditures, the *Buckley* Court rejected the argument that either the State's interest in preventing corruption, or the ancillary interest in equalizing the relative ability of individuals and groups to influence the outcome of elections, could justify the burden on core First Amendment expression. Act 64 runs afoul of this principle by attempting to introduce financial parity into

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[3] The Intervenor Respondents urge the Court to abandon the exacting scrutiny required by *Buckley*, and to uphold the expenditure limits under the analysis applicable to content-neutral regulation of speech applied in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). This argument underscores a fundamental misconception that the Court addressed directly in *Buckley*. Discussing its decision in *Kovacs v. Cooper*, 336 U.S. 77 (1949), the Court explained that "[t]he decibel restriction upheld in *Kovacs* limited the *manner* of operating a sound truck, but not the *extent* of its proper use." *Buckley*, 424 U.S. at 18 n.17. By contrast, the Court explained, "[FECA's] dollar ceilings restrict the extent of the reasonable use of virtually every means of communicating information." *Id.* The same distinction applies to Act 64 because it operates as a direct restraint on speech.

the election process in a way that directly restrains speech. If Vermont wants to accomplish this goal, it can do so by providing a meaningful public funding alternative that does not suppress speech.

Turning next to the expenditure limits imposed on candidates from personal or family resources, the *Buckley* Court explained:

> The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly advocate his own election and the election of other candidates. Indeed, it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day.

424 U.S. at 52-53.

As the Court stated in summarizing its position, "the First Amendment simply cannot tolerate [the] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." *Id.* at 54. That principle is not limited to self-funded candidates, and cannot be reconciled with the expenditure limits imposed by Act 64.

Finally, the *Buckley* Court noted that "[t]he major evil associated with rapidly increasing campaign expenditures is the danger of candidate dependence on large contributions," not the aggregate financial resources available to the candidate's campaign. *Id.* at 55-57. The Court then concluded that the interest in alleviating the corrupting influence of candidate dependence on large

contributions is fully served by contribution limits and disclosure provisions. *Id.* at 56-57.

> Given the limitation on the size of outside contributions, the financial resources available to a candidate's campaign, like the number of volunteers recruited, will normally vary with the size and intensity of the candidate's support. There is nothing invidious, improper, or unhealthy in permitting such funds to be spent to carry the candidate's message to the electorate.

424 U.S. at 56 (footnote omitted).

Despite this unambiguous holding, Respondents nonetheless argue that Act 64's spending limits can withstand the exacting scrutiny required by *Buckley*. To do this, Respondents grossly exaggerate the presence and appearance of corruption in Vermont and urge this Court to extend the definition of corruption in a way that moves beyond the rationale that is *Buckley*'s very foundation. That effort is both constitutionally and factually flawed.

B. Act 64's Expenditure Limits Are Not Supported by Any Compelling State Interest

1. *Expenditure Limits Are Neither a Necessary Nor Appropriate Response to Respondents' Overstated Claims of Political Corruption in Vermont*

Respondents grossly exaggerate the presence of "corruption" in Vermont. Respondent's grim view of the Vermont political scene would be unrecognizable to many Vermonters. It is not supported by the record, nor does it make intuitive common sense. Vermont is a small state with the second smallest legislative districts in the

country. House districts are often contiguous with the boundaries of a single small town, with a gross population of about 4000 and perhaps 2600 registered voters. Representatives serve in the legislature part-time; most have other jobs; you can speak with them over coffee in the local diner. Vermont's candidates and officials are not "locked away" in some office, as Respondents would have us believe; rather, both plaintiffs' and defendants' witnesses testified that door-to-door campaigning was the norm in legislative elections, and that Vermonters expected to meet candidates at "grass roots" events. Moreover, because of Vermont's small population, it has more "government per capita" than a large state and it is therefore relatively easy for "ordinary" individuals to have access to their elected officials. Vermont's Statehouse has no security check points and legislative hearings are posted on a user-friendly web site so interested citizens can attend. *See http://www.leg.state.vt.us/schedule/schedule2.cfm.*

Despite Respondent's shrewd emphasis on anecdotes suggesting that large contributors are disproportionately influential, elected officials who were witnesses for the State actually testified that they often returned constituents phone calls and readily provided access to "ordinary" voters. Elizabeth Ready, who was then a State Senator and has since served as Auditor of Accounts, testified that she provided access to any constituent. Voters in her district would leave notes on her kitchen table in her Lincoln home, which she leaves unlocked. Tr. IX – 165-66.[4] Similarly, Cheryl Rivers,

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[4] Despite her grass roots credentials, Ms. Ready vastly exceeded the Act 64 spending limit in the 2000 Auditor's race. *See http://vermont-elections.org/elections1/campaign_finance_history.html.* She served as State Auditor until 2004 when she was defeated

who was a State Senator at the time and has since run for Lieutenant Governor, testified that she would return the phone call of a homeless person before that of a large donor. Tr. VII – 106.[5]

Moreover, while Respondents use the terms "unlimited cash" and "unlimited campaign spending" over and over again in their briefs,[6] the record belies the rhetoric. Indeed, Respondents concede that "[c]ampaigns for political office in Vermont are generally low cost and do not require the raising of sums as large as those in other parts of the country." *Brief of Respondents Sorrell et al.* at 8. Vermont ranked 49th in spending in gubernatorial campaigns across the country. J.A. 49. If anything, the record shows that campaign spending in Vermont has been "restrained," not "unlimited." As such, the "arms race" posited by Respondents is a myth.

Similarly, Respondents have miscast or exaggerated the several claimed examples of improper influence set forth in their briefs. At the outset, it must be noted that if there were outright, egregious examples of corruption in Vermont it certainly would have been

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by political newcomer Randy Brock. Brock significantly outspent Ready in 2004, *see id.*, but despite the alleged "arms race mentality," Ms. Ready must not have believed it was necessary to spend as much as her challenger. *See Brock Wins Auditor*, The (Montpelier-Barre, VT) Times Argus (Nov. 2, 2004) (race was "shaped by questions about Ready's resume").

[5] Ms. Rivers similarly exceeded the Act 64 limits by more than double in her run for State Senate in 2000. *See http://vermont-elections.org/elections1/finance_search.html.*

[6] Respondents Vermont Public Interest Group et al., use the term "unlimited" as a modifier for "spending" or "fundraising" twenty-two times in their brief. The term appears in similar usage numerous times in the brief for Respondents Sorrell et al.

presented at trial. Instead, as examples, Respondents claim that the wine lobby and beverage companies succeeded in defeating an expanded bottle bill, in spite of public support for the bill. They assert similarly that the slate industry pushed through certain regulatory changes in the state's land use regulations after making contributions to committee members.[7] Finally, Respondents point to representatives of the tobacco industry who distributed checks at the Statehouse shortly after a vote on a bill affecting tobacco interests.[8]

In none of their examples have Respondents shown that the contributor's influence was in any way "improper." Rather, it is in the nature of politics that candidates will be influenced by their supporters and sometimes vote in a way that produces the political outcomes the supporter favors. *McConnell*, 540 U.S. at 297 (Kennedy, J., concurring in the judgment in part and dissenting in part). In the absence of evidence that *large* contributions are being deployed to exert "undue" influence, there is nothing invidious about this type of responsiveness. "Democracy is premised on

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[7] The largest contribution cited by Respondents was a $500 contribution to members of a Senate committee considering legislation affecting that industry. Tr. II – 92. Such contributions were perfectly legal at the time, and are hardly egregious given that the new limits would permit industry groups to contribute $300 to each committee member.

[8] In fact, these contributions were all less than $100. Respondents also allege that then-Governor Dean met with representatives of the Monsanto Corporation while refusing to meet with members of a group of farm advocates on the same issue. Respondents mislead the Court by failing to set out the complexities surrounding the bovine growth hormone debate, which may well have influenced the Governor's decision on with whom he was willing to meet.

responsiveness." *Id.*; *see also Brown*, 456 U.S. at 56 ("We have never insisted that the franchise be exercised without taint of individual benefit...").[9]

Finally, much of Respondents' briefing is addressed to the public's distrust, apathy, and cynicism about the political process. The suggestion, however, that campaign spending is the cause of the public's malaise and that Act 64 will somehow cure it is surely short-sighted and lacks any understanding of history. Public cynicism and distrust of politicians is ancient. *See, e.g.*, Babylonian Talmud, Pirkei Avot 2:3. As such, the State has overplayed its hand; Respondents have greatly exaggerated the presence of "corruption" in Vermont while at the same time seriously understating the harm Act 64 will cause the political process as we know it. Rather than curing a "distorted political process," Act 64 will stifle core political speech and association.

2. *The State's Desire to Limit the Time Spent Fundraising Is Inadequate to Justify These Expenditure Limits*

Respondents and some *amici* note the increasing demands placed on fundraising in congressional elections.

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[9] "Access in itself...shows only that in a general sense an officeholder favors someone or that someone has influence on the officeholder. There is no basis in law or fact to say that favoritism or influence in general is the same as corrupt favoritism or influence in particular." *McConnell*, 540 U.S. at 296 (Kennedy, J., concurring in the judgment in part and dissenting in part); *see also id.* at 259 (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("[Providing access to one's allies] is in the nature of politics — if not indeed human nature — and how this can properly be considered 'corruption' (or 'the appearance of corruption')...is beyond me.").

As we show in our opening brief at 16, 33-34, these concerns do not pertain in Vermont. Given the relatively modest sums spent on Vermont elections, especially in legislative elections, fundraising cannot be considered a significant concern. In any event, Act 64 actually makes fundraising more difficult because the expenditure limits were adopted in tandem with diminutive contribution limits. Limiting the size of individual contributions necessarily increases the amount of time that must be spent raising campaign funds. In addition, by applying the contribution limits equally to political parties and associations, the State has thwarted the ability of these organizations to consolidate the contributions of many individual supporters in a way that would lessen the time candidates spend fundraising. Of course, a generous and meaningful system of public finance would alleviate any remaining time-protection concerns.

C. Act 64's Expenditure Limits Are Not Narrowly Tailored

Quite apart from whether the spending limits further the interests they seek to advance, they are not narrowly tailored. No remand is necessary because *Buckley* has already established that contribution limitations and disclosure requirements are the "primary weapons" against the reality or the appearance of improper influence. *Id.* at 58. *Buckley* also established that public financing may be conditioned on the agreement to comply with specified spending limits. *Id.* at 57 n.65. Because Vermont has not tried any of these less speech-restrictive alternatives, Act 64 is not narrowly tailored.

There is no basis in the record to conclude that the State's interests in preventing corruption will not be

adequately served by reasonable contribution limits. Even if Act 64's contribution limits are set aside by this Court because they are unreasonably low, the record does not support the conclusion that the pre-existing limits, in combination with the State's disclosure provisions, are insufficient to address the danger of candidate dependence on large contributions. If the State believes these options are inadequate, despite the lack of record evidence, it remains free to adopt a meaningful public financing system. This option has the advantage of advancing the State's interests without suppressing core political speech. In their brief, the State Respondents refer to the failure of voluntary spending limits without mentioning that these limits were part of a pre-Act 64 system that did not provide the incentive of public financing.

Respondents claim that Act 64's spending limits are "precisely targeted" and will not harm candidates because they allow for "effective advocacy." But, as Respondents concede, Act 64's limits were set by looking toward "average" spending in previous elections, where reports were filed under the old law.[10] The problems inherent in relying on past averages are set out in our opening brief at 7-12, and 35-37. The amount of campaigning that gets done in any election — and hence the amount of spending — will vary by candidate, year,

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[10] Despite lengthy legislative hearings, Act 64's spending limits were not precisely tailored. The State did not employ a careful calculation or a proper statistical analysis that weeded out the highest and lowest spending races, or even make a reasoned judgment as to the amount thought proper for robust debate. Instead, the limits are merely set to approximate "average" (and here the term is not meant in its technical, mathematical sense) spending. This is not the narrow tailoring required by the First Amendment.

and district. In general, however, Act 64 will prevent candidates in state-wide contests[11] and in large multimember senate districts from communicating their message to voters. Candidates in elections that are hotly contested will be similarly stymied, as high spending races often involve important or controversial issues of public policy and intense public involvement.[12]

Removed from the statistics and abstractions, it is easy to see how these spending limits will harm many candidates, and a remand is not required to reach that conclusion. The $2000 limit will seriously impede many House candidates from running effective campaigns. As the record shows, most House candidates do engage in all manner of grass roots campaigning, including going door-to-door and attending community forums. *Brief of Respondents Sorrell et al.* at 8-9. Under Act 64's regulatory scheme, however, going door-to-door does cost money. The use of a car — necessary in Vermont's rural districts — must be accounted as an expense. Most candidates give out a brochure when they go door-to-

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[11] Spending in gubernatorial elections has vastly exceeded Act 64's limits, both before and after its passage. For example: 1986: Peter Smith $482,236, Madeline Kunin $478,294; 1988: Michael Berhardt $441,473, Madeline Kunin $639,863; 2000: Howard Dean $946,443, Ruth Dwyer $899,581, Anthony Polina $355,412; 2002: Jim Douglas $1,124,519, Doug Racine $723,907, Con Hogan $265,192. *See* Appendix at 1a (chart of spending in Vermont gubernatorial races from 1986 to 2004).

[12] The 2000 gubernatorial race was such an election. Governor Howard Dean had recently signed civil unions into law and his challenger, Ruth Dwyer, opposed the measure and urged her supporters to "Take Back Vermont." Road signs with the "Take Back Vermont" message sprung up throughout the State, and many still remain. Governor Dean and Ruth Dwyer each *tripled* the Act 64 spending limit in that race. *See supra* note 11.

door, particularly since many constituents may not be home. Tr. I – 103-104. Designing and printing a decent brochure for all the households in a district costs $350-650. Printing just 100 yard signs costs about $500. Postcard mailings may run between $600 and $900 per mailing, when the costs of design, printing and postage are factored in. Tr. IV – 150-176.

Accordingly, if a candidate buys yard signs and prints a brochure to distribute while going door-to-door, Act 64 limits him to sending out only one postcard. He cannot send two, and probably cannot afford much in the way of newspaper advertisements — even in inexpensive local papers.[13] This is why most of the witnesses testified that it cost more than $2,000 to run an *effective* House campaign, with estimates running from $3,700 to $4,000-$6,000. Tr. IV – 227-40; *Id.* at 156-171. In objective terms, this is not a lot of money. It simply allows a House candidate to buy yard signs, place a couple of ads in the local paper, print a brochure, and send out some mailings. Act 64's $2,000 limit prevents a House candidate from doing even this — and the problem is magnified if the candidate has a primary. Thus, Respondents are wrong to brush aside this evidence by claiming that these races represent the extremes and focus only on "targeted" races. This is simply what it costs to run an active, competitive, effective campaign.

II. VERMONT'S LIMITATIONS ON INDIVIDUAL AND PARTY CONTRIBUTIONS TO CANDIDATES ARE NOT CLOSELY DRAWN TO SERVE A SUFFICIENTLY IMPORTANT GOVERNMENTAL INTEREST

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[13] At the time of trial, a quarter page ad in *The Burlington Free Press* cost $1,448. Ex. V, E-1888-1897.

A. Even Allowing for Legislative Discretion, Act 64's Contribution Limits Are Unreasonable and Unjustified

Contribution limits must be "closely drawn" to serve a "sufficiently important interest." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 387-388 (2000) (citation and internal quotation marks omitted). Thus far, the only sufficiently important governmental interest identified by the Court is the avoidance of corruption or appearance of corruption that flows from *large* campaign contributions. *Id.* at 388. The evidence necessary to make this showing need not be as specific as that which would be required to sustain a direct limit on speech (such as expenditure restrictions), but where, as here, the record fails to disclose any evidence that large contributions are routinely made, the State's burden is not satisfied. This is because the justification for contribution limits stems not from campaign contributions *per se*, but from the potential for corruption attributed to *large* campaign contributions. The State's evidence on this threshold issue is extremely thin and largely misdirected.

Indeed, the record is barren of any evidence of objectively large contributions prior to Act 64. Spending was reasonably restrained in most races, and the press did a good job of exposing questionable practices. *See Brief of Respondents Sorrell et al.* at 35-39; Tr. IX – 95-96; Tr. VII – 112. Moreover, neither *Buckley* nor *Shrink* can be read to support the view that mere public cynicism of lobbyists and their activities can justify the type of stringent limits at issue here.

Lacking evidence of corruption under pre-existing limits or of a regime of large contributions, the State Respondents argue that they should not be required to

wait, in Vermont, until actual corruption occurs. Rather, Respondents urge, the legislature is justified in relying on evidence from other states or from the federal arena to justify draconian restrictions in Vermont. Citing *Shrink*, the Respondents essentially argue that the danger of real corruption is so inherent in the political system that they need not prove its actual existence. *Shrink* does not go so far. The fact that contribution limits are subject to diminished First Amendment scrutiny does not mean that they are subject to no scrutiny at all.

Moreover, even if only a scintilla of evidence is required to justify some level of contribution limits, the legislature still has an obligation, when it drastically reduces existing limits, to narrowly tailor the revised limits to fit the current circumstances. *Shrink* instructs that contribution limits be "closely drawn" to serve the interests they purportedly advance. 528 U.S. at 387-88. The idea that a candidate would be unduly influenced by a contribution from a single contributor of $200, $300 and $400 is counterintuitive and not supported by the record. Rather, the limits were set primarily to reduce overall spending, using averages that include even uncontested races, and incorporating irrational and unsupported features — including the per-cycle counting rule, and the wealthy family exception.[14] There is simply no excuse or corruption rationale for enforcing the limits on an election-cycle basis when the evidence shows that this practice will plainly disadvantage candidates who have exhausted their base of contributors to win the party

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[14] Under the Act, campaign contributions from "immediate family" members are not subject to any limitation. The Act strangely defines "immediate family" members as persons related within the "third degree of consanguinity." At trial, even Defendants' attorneys did not know the definition of "third degree of consanguinity."

nomination and must identify new contributors to finance the general election. Whenever a candidate must face an opponent in the general election who did not have a primary opponent, the disadvantage cannot realistically be overcome. Tr. II – 185-89; Tr. IV – 177-78; Tr. IV – 27-34. Respondents fail to respond to these objections, except to press the State's bottom-line argument that it has virtually plenary power to regulate campaign contributions.

B. Political Parties Should Not Be Treated As If They Were Single Individual Contributors

In treating political parties and political committees as if they were individual contributors, moreover, the limits trample the weighty associational interests at stake by restricting the rights of individuals who come together for a common purpose. Instead of reining in the "special interests" and industry groups that concern the Respondents, Vermont's new limits will choke-off "clean" money from the very sources that clearly pose a lesser risk of corruption. Nowhere will the impact be harder felt than in those elections where the candidate relies on these contributions for "seed money" to jumpstart his or her campaign or for a last hour boost of resources in a close election. Political parties and House/Senate election committees uniquely fill this void. There is simply no justification for all but shutting these organizations from the process.

Moreover, Respondents' reliance on *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) ("*Colorado II*"), is misplaced. In that case, this Court sustained regulation of party-coordinated expenditures against an argument that all party limits were unconstitutional. *Colorado II* does not stand for the

broader proposition that political parties can be regulated as if they were single individual contributors. As the district court recognized, "Political parties speak with a different voice than individuals." P.A. 76a. With Vermont's $200-$400 election cycle limits and the related expenditure rule, parties will be unable to run coordinated "get out the vote" campaigns with candidates, share mailing lists, allow paid staff to assist candidates, or, in short, to engage in any of the typical (and decidedly non-corrupt) activities they have previously done. The district court struck down these low party contribution limits, finding that "[f]or the stability and consistency of our competitive electoral process, parties must continue to function as they have in the past." P.A. 76a.

III. THE FIRST AMENDMENT DOES NOT PERMIT VERMONT TO TREAT INDEPENDENT EXPENDITURES AS CONTRIBUTIONS

Pursuant to 17 V.S.A. § 2809, political parties or committees that engage in independent expenditures that benefit six or fewer candidates must report those expenditures as contributions. Under this "Related Expenditure" provision, these independent expenditures are regarded as the candidate's own speech and counted as both contributions to the candidate and expenditures by the candidate — subject to the relevant limitations. It is axiomatic that Supreme Court precedents prohibit limitation of independent expenditures. *See Buckley*, 424 U.S. at 45-47; *see also Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 618 (1996) ("*Colorado I*") (plurality opinion); *id.* at 627 (Kennedy, J., concurring in the judgment and dissenting in part). Because of the constitutional difference between independent expenditures and "contributions," it is not constitutionally

permissible for the Vermont to presume that the former is the latter. Moreover, treating "related expenditures" as contributions to the candidate is quite restrictive, as a political party will use up its allotted $200-$400 contribution limit quickly and then be prohibited from making any other direct, in-kind, or "related" contributions to the candidate.

For the first time in this litigation, the State Respondents now claim in their brief that the presumption "comes into play only if the matter is brought to court" and is "merely an evidentiary presumption." *Brief of Respondents Sorrell et al.* at 48. Such assertions fly in the face of the statute, the Vermont Secretary of State's official guidance,[15] and the position Respondents have taken throughout this litigation. Political parties, committees, PACs and candidates are all required to report spending and contributions at specified times and on forms promulgated by the State. 17 V.S.A. §§ 2803, 2811, 2821-23, 2831. If a political party makes an expenditure that benefits six or fewer candidates, it is "presumed" to be a "related" expenditure. 17 V.S.A. § 2809(d). This is part of the *definition* of a "related" expense, not, as the State now asserts, merely part of a procedural rule for litigation. As such, the plain language of the statute would require the party to report the contribution to the candidate, and for the candidate to report the same as a contribution and expense.

The state thus grossly underestimates the chilling effect of the "related" expenditure provision. While the presumption can be rebutted, both the candidate and party are presumed to have violated the law whenever a party

[15] *See http://vermont-elections.org/elections1/2005CFGuide1129rev.pdf* at 13-15.

makes an expenditure over the $200-$400 contribution limits to benefit six or fewer candidates. Recent statutory amendments give the Attorney General additional investigative powers to enforce these provisions. 17 V.S.A. § 2806a. The candidate will be forced to expend her limited resources to disassociate from independent spending over which she has no control.[16] Those unwilling to risk prosecution by the State — or suits by their opponents — will be effectively silenced.

CONCLUSION

For the reasons stated herein, in our opening brief and in the briefs of the consolidated Plaintiffs, the judgment below should be reversed.

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[16] The State Respondents now suggest for the first time that the costs of defending against such prosecution or investigation may not count as an "expenditure." *See Brief of Respondents Sorrell et al.* at 26 n.15. This flatly contradicts the plain language of the statute and the Vermont Secretary of State's "authoritative construction." *See http://vermont- elections.org/elections1/2005CFGuide1129rev.pdf* at 11 (no difference between a political party's administrative expenses and any other expenses).

APPENDIX

Chart Showing Spending in Vermont Gubernatorial Elections from 1986-2004

Available at http://vermont-elections.org/elections1/campaign_finance_history.html

SPENDING IN VERMONT GUBERNATORIAL ELECTIONS 1986-2004

1986	Peter Smith	$482,236
	Madeline Kunin	478,294
1988	Madeline Kunin	639,863
	Michael Bernhardt	441,473
1990	Richard Snelling	447,479
	Peter Welch	281,541
1992	Howard Dean	253,528
	John McClaughry	131,407
1994	Howard Dean	180,145
	Thomas Morse	113,426
1996	Howard Dean	$124,975
	John Gropper	46,241
1998	Howard Dean	657,065
	Ruth Dwyer	249,188
2000	Howard Dean	946,443
	Ruth Dwyer	899,581
	Anthony Polina	335,412
2002	Jim Douglas	1,124,519
	Doug Racine	723,907
	Con Hogan	265,192
2004	Jim Douglas	681,662
	Peter Clavelle	502,537